

IN THE COURT OF APPEALS OF TENNESSEE  
AT NASHVILLE  
July 11, 2006 Session

**COLETTE CALMELET v. MARCEL YEMBA ELUHU**

**A Direct Appeal from the Circuit Court for Williamson County  
No. 1-26597    The Honorable Timothy L. Easter, Judge**

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**No. M2005-01981-COA-R3-CV - Filed on July 27, 2006**

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This is a parental relocation case. Mother/Appellant appeals from the trial court's order denying her request to relocate with the parties' three minor children on the grounds that the relocation had no reasonable purpose as required by T.C.A. §36-6-108. We affirm.

**Tenn. R. App. P. 3; Appeal as of Right; Judgment of the Circuit Court Affirmed**

W. FRANK CRAWFORD, P.J., W.S., delivered the opinion of the court, in which DAVID R. FARMER, J. and HOLLY M. KIRBY, J., joined.

Eddie Davidson of Nashville, Tennessee for Appellant, Colette Calmelet

Larry Hayes, Jr. of Nashville, Tennessee for Appellee, Marcel Yemba Eluhu

**OPINION**

Colette Calmelet ("Mother," or "Appellant") and Marcel Yemba Eluhu ("Father," or "Appellee") are the parents of three minor children, Sylvia, age 15, Megan, age 13, and Francesca, age 8. The parties were divorced by Final Decree of February 27, 2002. The parties were granted joint custody of the three children. Dr. Calmelet was named primary residential parent. Dr. Eluhu was granted visitation with the children every Wednesday from the time they left school until 7:30 p.m., every other weekend from Thursday until Sunday, approximately one-half of the children's summer vacation, and alternating holidays and school breaks.

Dr. Eluhu is a cardiologist in Nashville, Tennessee, where he has practiced for thirteen (13) years. Dr. Calmelet has a Ph.D. in applied mathematics from Vanderbilt University. She is an associate professor at Tennessee State University ("TSU"), where she has been employed since 1992. Dr. Calmelet has had tenure at TSU since 1997 or 1998. At the time of the hearing in this case, Dr.

Calmelet's total salary was \$56,407.00, which included a base salary of \$48,941.00 and a "summer salary" of \$7,466.00 from a grant through Vanderbilt University.<sup>1</sup>

In the fall of 2004, Dr. Calmelet began looking for other employment. Dr. Calmelet testified that nothing happened at TSU to cause her to start searching for other employment. Dr. Calmelet's job search included universities in Iowa, Utah, Pennsylvania, Florida and Texas. In March 2005, Dr. Calmelet was offered a position as an associate professor of mathematics with Southern Utah University ("SUU"), which is located in Cedar City, Utah. The base salary for the position at SUU is \$51,000.00; however, Dr. Calmelet will not be eligible for tenure at SUU until sometime in 2008. In addition, Dr. Calmelet will be required to teach twelve (12) hours per week as opposed to the six (6) hours per week she was teaching at TSU.<sup>2</sup> Dr. Calmelet signed an "Acceptance of Appointment" with SUU on April 9, 2005.

Pursuant to T.C.A. § 36-6-108, on or about March 29, 2005, Dr. Calmelet notified Dr. Eluhu by certified mail of her intention to move to Cedar City, Utah. On April 27, 2005, Dr. Eluhu filed a petition in opposition of Dr. Calmelet's proposed relocation. In his petition, Dr. Eluhu asserted that Dr. Calmelet's relocation had no reasonable purpose, and asserted that her request should be denied on that ground. On May 5, 2005, Dr. Calmelet filed a response to Dr. Eluhu's petition in opposition of the relocation, in which she generally denied the material allegations contained in Dr. Eluhu's petition.

The hearing on Dr. Eluhu's petition in opposition of relocation and Dr. Calmelet's petition to relocate with the minor children was heard by the trial court, sitting without a jury, on July 1, 2005. Following the hearing, the trial court entered its Order on July 7, 2005. The Order reads, in relevant part, as follows:

...[T]he Court finds that this matter is governed by the provisions of Tenn. Code Ann. § 36-6-108. The Court further finds that the parties do not spend substantially equal amounts of time with the minor children, Mother spending a greater amount of time with the children than Father and that therefore Mother's proposed relocation is governed by Subsection (d) of said statute.

The Court finds that the proposed relocation by Mother to Cedar City, Utah lacks a reasonable purpose and that the relocation should therefore be denied. The evidence is insufficient to support a finding that the Southern Utah University position offers Mother a better job opportunity than the opportunities that she currently has at

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<sup>1</sup> Ms. Calmelet also receives benefits including, *inter alia*, insurance, leave time, and retirement from her employment at TSU. In addition, Ms. Calmelet has received yearly salary increases of approximately 3%.

<sup>2</sup> Dr. Calmelet testified that she would be required to teach fifteen (15) hours per week at TSU if she did not have the Vanderbilt grant. However, she testified that her teaching load was reduced due to her work through Vanderbilt.

Tennessee State University. The Court further finds that Mother's credibility is seriously in question and that her testimony regarding the value of the relocation for career enhancement is suspect based upon Mother's evasiveness not only at the trial of this cause but also in her deposition testimony wherein she gave misleading answers, particularly with regard to the issue of one Dr. Rosenhaus. The Court further finds that the testimony offered by Mother at the trial of this cause regarding the potential value to her of the relocation in terms of salary and potential benefits is self-serving testimony and is not credible proof.

The Court finds that the new job for which Mother proposes to relocate to Utah offers the same job title, a lower salary, that Mother's financial resources will be negatively impacted by the relocation, and that it will take at least three (3) years for Mother to obtain the tenure that she currently enjoys at her current job at Tennessee State University. The Court finds that the benefit of tenure is sufficient, in and of itself, to support a finding that the opportunities available to Mother at her current job are better than the opportunities she anticipates in Utah, which anticipated opportunities the Court finds to be uncertain at best.

Finally, the Court notes that Mother's proposed relocation is at odds with the parties' Final Decree entered February 27, 2002 as it relates to the parties' understanding and agreement that the minor children would remain at the University School of Nashville or a comparable private school through grade twelve (12). The Court finds that Mother offered no evidence that there even is a comparable private school to the fine education that the minor children are receiving currently at the University School of Nashville. The Court therefore finds that Mother's proposed relocation to Utah would frustrate the goal and purposes of the parties' agreement expressed in the Marital Dissolution Agreement incorporated into the Final Decree of Divorce.

It is, therefore, **ORDERED, ADJUDGED and DECREED:**

1. Father's Petition in Opposition to the Relocation proposed by Mother is granted, and Mother's proposed relocation with the minor children to Cedar City, Utah is denied.

Dr. Calmelet appeals from this Order and raises two issues for review as stated in her brief:

1. Whether the evidence preponderates to the contrary of the trial court's finding that Mother's proposed relocation does not have a reasonable purpose.
2. Whether the trial court erred in allowing testimony of pre and post-divorce matters concerning Dr. Rosenhaus in light of the court's pre-trial directive, the Tennessee Rules of Evidence concerning relevancy, and the case law disallowing pre-divorce issues to be litigated in post-divorce proceedings.

We will first address the second issue concerning whether the trial court erred in allowing Dr. Calmelet to be questioned about Dr. Rosenhaus. Specifically, Dr. Calmelet argues that the trial court erred in allowing the following line of questioning<sup>3</sup>:

Q [to Dr. Calmelet]. Now, ma'am, during the divorce proceedings Dr. Eluhu accused you of having an affair with a man named Rosenhaus, didn't he?

A. Yes.

THE COURT: Hold on, Mr. Hayes [attorney for Dr. Eluhu], is there an objection?

MS. HOOD [attorney for Dr. Calmelet]: Yes, Your Honor.

THE COURT: Can you tell me how this is relevant?

MR. HAYES: Your Honor, it's relevant for veracity. I'm going to make it relevant because she lied and she admitted that she lied. And, Your Honor, it's also relevant because when the truth comes out in this case you're going to see the real motivation is not any job or position, it's this Rosenhaus guy. That's why she's going west, Your Honor.

THE COURT: In your Memorandum that you filed with the Court—

MR. HAYES: I didn't get into Rosenhaus.

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<sup>3</sup> For the purpose of placing the disputed line of questioning in its full context, we quote more extensively from the record than Appellant.

THE COURT: –you allege that the opposition here was no legitimate purpose or whatever that prong of the statute is, so I, based upon reading that, thought that’s what we were going to stick to today.

MR. HAYES: It is, Your Honor, but this woman is saying to the Court that this is my purpose, and I submit that the proof will show that there’s a hidden agenda here that she’s not telling the Court about. I’m not going to get very far into name-calling in this thing, Your Honor. You know me well enough that I’m going to try to stick to it as close as I can and the extent of those questions on the divorce are basically that she admitted she lied to Dr. Eluhu about Dr. Rosenhaus, and that’s all I’m going to ask her.

MS. HOOD: Dr. Rosenhaus, the proof will show that he lives in California. She’s requesting a move to Utah. It still requires a plane flight from Utah to California or Tennessee to California. She’s already testified that she’s applied to colleges all over. I don’t think any testimony about Dr. Rosenhaus, the man that Dr. Eluhu blames for the demise of their marriage is relevant to the relocation considering he lives in a state that requires her to get to him by plane.

THE COURT: I will allow a limited amount of it, Mr. Hayes.

BY MR. HAYES:

Q. Now, Dr. Calmelet, the question was Dr. Eluhu had accused you of having a relationship with Dr. Rosenhaus during the marriage, correct, during the divorce proceeding?

A. Yes.

Q. And you admit you lied to Dr. Eluhu about that relationship?

A. At what point?

Q. At any point, ma’am, did you ever lie to Dr. Eluhu about your relationship with Dr. Rosenhaus?

A. This was during the divorce.

Q. Yes, ma’am. Did you lie to Dr. Eluhu about Dr. Rosenhaus, yes or no?

A. I mean you have to be specific because–

Q. Let me hand you a copy of your deposition. I have handed you a copy of your deposition from your divorce case in August 2001 and, if you would, turn to Page 134 beginning at Line 4.

Question: Did Dr. Eluhu ever find a card in your closet?

Answer: Yes.

Question: Who was the card from?

Answer: Dr. Rosenhaus.

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Question: Did he [Dr. Eluhu] confront you [Dr. Calmelet] about it [the card from Dr. Rosenhaus]?

Answer: Yeah.

Question: What did you tell him?

Answer: Marcel [Eluhu] is jealous. I was scared and I didn't tell him.

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Question: And I wanted to make sure—I just wanted to make sure, so what did you say when he confronted you about it?

Answer: I didn't tell him it was from Dr. Rosenhaus.

Question: What did you tell him?

Answer: He kept questioning me where it came from and I said I don't know, I think it's an old card that I had.

Question: And that wasn't true, was it?

Answer: And I admit that I lied to him, yeah, I didn't tell him it was from Dr. Rosenhaus because I was scared.

Q. That was your testimony, wasn't it?

A. Yes.

Q. So you did lie to Dr. Eluhu about Dr. Rosenhaus, didn't you?

A. In this context.

Q. And, ma'am, your deposition I took on June 16<sup>th</sup>, do you have that in front of you?

A. Yes.

Q. Did you lie to me at all about Dr. Rosenhaus in that deposition?

A. No.

Q. If you would, ma'am, turn to Page 68 of that deposition.

A. (Witness complied)

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Q. Beginning at Line 3.

Question: When is the last time you talked to Dr. Rosenhaus?

Answer: I don't recall.

Question: Have you talked to him this year?

Answer: I don't recall.

Question: When is the last time you saw Dr. Rosenhaus?

Answer: I don't recall.

Q. Ma'am, you're lying to me right there, aren't you?

A. No.

Q. You're not? We'll, ma'am, didn't proof later establish that you'd been to Cancun with Dr. Rosenhaus over Christmas of 2004?

A. Yes.

Q. Stayed with him for a week in the same room?

A. Yes.

Q. Traveled to San Francisco with him, didn't you?

A. Yes.

Q. Stayed in the same room with him, didn't you?

A. Yes.

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Q. And all this has been in the last year, hasn't it?

A. Yes.

Q. So you don't think you were lying to me when you said "I don't recall" to all three of those questions?

A. No.

Q. Do you think you're being a little evasive?

A. If I don't recall I don't recall.

We first note that it is well settled that the admissibility of evidence is a matter that rests within the sound discretion of the trial court. *State v. Ballard*, 855 S.W.2d 557, 562 (Tenn.1993); *Wright v. Quillen*, 909 S.W.2d 804, 809 (Tenn. Ct. App.1995). The appellate court will not reverse the trial court's decision on the admissibility of evidence absent clear abuse of discretion. *State v. Rhoden*, 739 S.W.2d 6 (Tenn. Crim. App.1987). The abuse of discretion standard requires us to consider: (1) whether the decision has a sufficient evidentiary foundation; (2) whether the trial court correctly identified and properly applied the appropriate legal principles; and (3) whether the decision is within the range of acceptable alternatives. *State ex rel. Vaughn v. Kaatrude*, 21 S.W.3d 244, 248 (Tenn. Ct. App.2000).

Although Dr. Calmelet may be correct in her assertion that any relationship she may or may not have engaged in with Dr. Rosehaus would not, in and of itself, be relevant to the current



proceedings under Tenn. R. Evid. 401, she overlooks the well established principle that a witness may be cross-examined as to specific acts that involve that witness' truthfulness. Tenn. R. Evid. 608(b) provides, in pertinent part, as follows:

**Evidence of character and conduct of witness.**

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**(b) Specific Instances of Conduct.**-Specific instances of conduct of a witness for the purpose of attacking or supporting the witness's credibility, other than convictions of crime as provided in Rule 609, may not be proved by extrinsic evidence. They may, however, if probative of truthfulness or untruthfulness and under the following conditions, be inquired into on cross-examination of the witness concerning the witness's character for truthfulness or untruthfulness or concerning the character for truthfulness or untruthfulness of another witness as to which the character witness being cross-examined has testified. The conditions which must be satisfied before allowing inquiry on cross-examination about such conduct probative solely of truthfulness or untruthfulness are:

(1) The court upon request must hold a hearing outside the jury's presence and must determine that the alleged conduct has probative value and that a reasonable factual basis exists for the inquiry;

As noted by this Court in *Sneed v. Stovall*, 156 S.W.3d 1 (Tenn. Ct. App. 2004):

[Tenn. R. Evid. 608] prescribes when...specific instances of conduct, other than criminal convictions, may be used to impeach or rehabilitate a witness by proving the truthful or untruthful character of that witness. It should be obvious that Rule 608 is an exception to the general principle of Rule 404(a) that character evidence is inadmissible ...Rule 608 is based on the idea that sometimes character evidence should be admitted. By implication, the rule accepts the idea that a person's character is both a relevant and important factor in assessing that person's credibility. But it should be noted that Rule 608 opens the door to proof of only certain aspects of a person's character. This rule authorizes proof of a person's character for truthfulness or untruthfulness. Proof of other facets of character is not affected by Rule 608. Neil P. Cohen, et al., Tennessee Law of Evidence § 608.1 at 345 (3d ed.1995).

*Id.* at 4.

After the requisite hearing, *see* Tenn. R. Evid. 608(b)(1), the trial court determined that the disputed testimony was relevant to the veracity of the witness, Dr. Calmelet. We agree. The testimony at issue involves Dr. Calmelet's admission that she lied to Dr. Eluhu, and to his attorney, regarding a romantic relationship with Dr. Rosenhaus. Although, as noted above, the existence of a romantic relationship between Drs. Calmelet and Rosenhaus may not be relevant to the current proceedings, the fact that Dr. Calmelet lied about that relationship is relevant, and admissible under Tenn. R. Evid. 608, as it bears directly upon her truthfulness as a witness. Furthermore, Dr. Calmelet argues that, in allowing the questioning concerning Dr. Rosenhaus, the trial court violated its own pre-trial admonishment that it would allow "no name calling, no rehashing or re-fighting old battles already put away and decided in previous orders of the Court...." However, as discussed above, the disputed line of questioning constitutes a valid impeachment of the witness and does not rise to the level of "rehashing or re-fighting old battles." Consequently, the trial court did not err in allowing this testimony.

We now turn to the issue of whether the trial court erred in finding that there was no reasonable purpose for Dr. Calmelet's relocation. We first note that, because this case was tried by the court sitting without a jury, we review the case *de novo* upon the record with a presumption of correctness of the findings of fact by the trial court. Unless the evidence preponderates against the findings, we must affirm absent error of law. *See* Tenn. R. App. P. 13(d). Furthermore, when the resolution of the issues in a case depends upon the truthfulness of the witnesses, the trial judge who has the opportunity to observe the witnesses in their manner and demeanor while testifying is in a far better position than this Court to decide those issues. *See McCaleb v. Saturn Corp.*, 910 S.W.2d 412, 415 (Tenn.1995); *Whitaker v. Whitaker*, 957 S.W.2d 834, 837 (Tenn. Ct. App.1997). The weight, faith, and credit to be given to any witness' testimony lies in the first instance with the trier of fact, and the credibility accorded will be given great weight by the appellate court. *See id.; In re Estate of Walton v. Young*, 950 S.W.2d 956, 959 (Tenn.1997).

Parental relocation cases are governed by T.C.A. §36-6-108, which requires the trial court to determine whether the parents are actually spending substantially equal intervals of time with the child(ren). In the instant case, there is no dispute that Dr. Calmelet spends a greater amount of time with the children. Consequently this case is governed by T.C.A. §36-6-108(d)(1):

(d)(1) If the parents are not actually spending substantially equal intervals of time with the child and the parent spending the greater amount of time with the child proposes to relocate with the child, the other parent may, within thirty (30) days of receipt of the notice, file a petition in opposition to removal of the child. The other parent may not attempt to relocate with the child unless expressly authorized to do so by the court pursuant to a change of custody or primary custodial responsibility. The parent spending the greater amount of time with the child shall be permitted to relocate with the child unless the court finds:

(A) The relocation does not have a reasonable purpose;

- (B) The relocation would pose a threat of specific and serious harm to the child that outweighs the threat of harm to the child of a change of custody; or
- (C) The parent's motive for relocating with the child is vindictive in that it is intended to defeat or deter visitation rights of the non-custodial parent or the parent spending less time with the child.

In ***Kawatra v. Kawatra***, 182 S.W.3d 800 (Tenn. 2005), our Supreme Court clarified the application of this portion of the statute as follows:

The approach differs if the parents are “not actually spending substantially equal intervals of time with the child.” If the parent spending the greater amount of time with the child seeks to relocate with the child, the court shall permit the relocation unless it finds that: 1) the relocation fails to have a reasonable purpose; 2) the relocation poses a threat of “specific and serious harm” to the child that outweighs the threat of harm that a change of custody would pose to the child; or 3) the parent has a vindictive motive for relocating. ***Id.*** at (d)(1)-(3). If one or more of these grounds exist, the court shall determine whether relocation is in the child's best interests. ***Id.*** at (e).

***Id.*** at 802-803.

In the instant case, the burden is on Dr. Eluhu to prove, by a preponderance of the evidence, that Dr. Calmelet’s proposed relocation is not reasonable. Dr. Eluhu’s proof at the hearing consisted primarily of evidence suggesting that Dr. Calmelet’s appointment at TSU was more stable, more lucrative, and provided more benefits than the proposed teaching position at SUU. In addition, Dr. Eluhu provided proof that the children would be attending public schools in Utah, which is contrary to the agreement set forth in the Marital Dissolution Agreement as incorporated into the Final Decree of Divorce. Dr. Calmelet provided proof, in the form of her own testimony, that the position with SUU would provide more opportunities for career advancement while providing a comparable salary and benefits package. In addition, she testified that she had made contact with the Utah schools and was satisfied that the children would receive a comparable education to that provided by the private school they attend in Nashville. However, in this case, the trial court made specific findings concerning Dr. Calmelet’s credibility as a witness. These findings are set out in both the Order, *supra*, and in the trial court’s findings from the bench, to wit:

...[T]he question before the Court boils down to, does the proposed relocation meet the reasonable purpose test, which must have been demonstrated by Dr. Eluhu by a preponderance of the evidence. And the Court wants to emphasize that a preponderance of the evidence certainly envisions credible evidence and that’s where I think we have a problem here.

The credible evidence before this Court is insufficient to support a finding that the Southern Utah University position offers to Dr. Calmelet a better job opportunity than the opportunities that she currently has at Tennessee State University. As has been pointed out and the proof supports, the job title is the same, the salary is, the Court is convinced, less, and her financial resources would be negatively impacted if she made this move.

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This is where we have sort of a credibility issue. The credibility that this Court finds on the value for career enhancement in Utah to be, or at least the evidence that's submitted seems to be suspect, based upon her [Dr. Calmelet's] evasiveness and questions that were asked of her here today, as well as questions at her deposition and misleading answers that she gave, particularly regarding the issue of one Dr. Rosenhaus, the Court wants to specifically find that Dr. Calmelet's credibility is seriously in question and I say that to support my finding that the information that she alone has offered to rebut the question raised by Dr. [Eluhu]...is insufficient. The self-serving testimony that she did introduce regarding the potential value in terms of salary, potential benefits that could be offered in Utah, the Court finds to not be credible proof.

I find that the testimony alone does not support a positive answer to the reasonable purpose question raised by the Parental Relocation Statute

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The Court finds that Dr. Calmelet's testimony and evidence regarding opportunity for job advancements in Utah is uncertain at best....

The trial court's findings concerning Dr. Calmelet's credibility largely negate her testimony in this case. As noted above, when the resolution of the issues in a case depends upon the truthfulness of the witnesses, the trial judge who has the opportunity to observe the witnesses in their manner and demeanor while testifying is in a far better position than this Court to decide those issues. *See McCaleb v. Saturn Corp.*, 910 S.W.2d 412, 415 (Tenn.1995); *Whitaker v. Whitaker*, 957 S.W.2d 834, 837 (Tenn. Ct. App.1997).

In addition to the evidence concerning Dr. Calmelet's deception regarding her relationship with Dr. Rosenhaus, there is other evidence in this record from which the trial court could conclude that Dr. Calmelet is not a credible witness. Dr. Calmelet testified that, after accepting the position

with SUU and notifying Dr. Eluhu of her intention to relocate, Dr. Calmelet traveled to Austin, Texas, at the expense of Texas A&M University, to interview with them, to wit:

Q [to Dr. Calmelet]. Okay, now you admit that you went to Texas in April of 2005 to interview for that teaching position with Texas A&M?

A. Yes.

Q. You admit that after you had accepted the position at Southern Utah, after you had given notice to Dr. Eluhu that you intended to relocate to Utah, and after you had signed some document with Southern Utah entitled Acceptance of Appointment you still traveled to Texas to interview for a teaching position there?

A. Yes.

Q. And you allowed Texas A&M to pay for your airfare, your hotel and your food, correct?

A. Yes.

Q. And you admit that you never advised anybody at Texas A&M that you had already accepted a position at Southern Utah, correct?

A. Yes, but I told them that I had an offer.

Q. You told who?

A. The people at Texas A&M.

Q. Your testimony is that you told the people at Texas A&M that you had an offer?

A. Yes.

Q. Did you tell them you had accepted that offer.

A. No, but I did tell them that I'm considering it.

Q. So you were just considering going to Utah in April of 2005, is that your testimony....

A. No, but I could not tell the persons in Texas that I was accepting, that I'd already accepted, because then they would question why I'm coming so—

Q. I would think so. So, Ma'am, how do you explain to the Court why you went to Texas if you'd already committed to teach at Southern Utah? You promised them you would teach there.

A. Because I wanted to make sure for myself that that was the right decision; I wanted to compare, to have some comparison between what Texas can offer me, and then make the decision and not feel unsure if I made the right decision. So I wanted some confirmation that my decision was the right one.

Q. Ma'am, you agree that if you'd told Texas A&M that you'd already accepted a position at Southern Utah they would not have paid for you to fly down there, put you up in a hotel and feed you, would they?

A. No, they would not.

Q. So you just took a free ride on Texas A&M, didn't you?

A. No, that's not true.

From this, and the entire record before us, we cannot conclude that the trial court erred in its credibility findings. Therefore, the proof offered by Dr. Calmelet regarding her position with SUU and the reason for the relocation is not sufficient, on the basis of its lack of credibility, to overcome the evidence offered by Dr. Eluhu. Consequently, the trial court correctly found that Dr. Eluhu had met his burden to show, by a preponderance of the credible evidence, that the proposed relocation has no reasonable purpose.

We affirm the Order of the trial court. Costs of this appeal are assessed against the Appellant, Colette Calmelet, and her surety.

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W. FRANK CRAWFORD, PRESIDING JUDGE, W.S.